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No. 10-646

Supreme Court, U.S.
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In the Supreme Court of the United States

BRANDON WADE HEIN, ET AL., *Petitioners,*

v.

WILLIAM JOSEPH SULLIVAN, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where this Court has never held that the prosecution's constitutional obligation to correct false evidence under *Napue v. Illinois*, 360 U.S. 264 (1959) includes truthful but misleading testimony, and where the circuits are allegedly divided on this issue, should this Court in this federal habeas corpus action arising out of a California state court conviction find that "clearly established Federal law, as determined by the Supreme Court of the United States" (28 U.S.C. § 2254(d)) required the Ninth Circuit to grant relief on the ground that the prosecution failed to correct truthful but misleading testimony?

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STATEMENT OF THE CASE

A. State Trial Court Proceedings

On May 22, 1995, petitioner Jason Holland stabbed seventeen-year-old Jimmy Farris to death. That evening, Jimmy Farris had been in the backyard of his best friend, Michael McLoren, in Agoura Hills, California, when petitioners Jason Holland, Micah Holland, Brandon Hein, and Tony Miliotti entered the backyard uninvited, intent on stealing marijuana from McLoren. During the struggle which followed, petitioner Jason Holland stabbed Farris twice and McLoren four times. Farris's stab wounds killed him, one wound having penetrated his heart.

Sometime after the stabbings, McLoren hired attorney Ellery Sorkin to represent him. In a letter to Sorkin dated July 10, 1995 (the "immunity" letter), Deputy District Attorney Jeff Semow wrote:

> This is to assure you and your client, Michael McLoren, that nothing he tells me or the investigating officers about marijuana will be used in any way against him.

Semow apparently wrote the letter to induce McLoren to be truthful that he was selling marijuana from the fort, and that petitioners had come to steal it, freeing McLoren from the concern that the district attorney was building a case against McLoren for his marijuana dealings.

During the 1996 jury trial in the Los Angeles County Superior Court, McLoren testified that, when he was initially interviewed by Detective Tauson at the hospital, he did not "trust the police" because he was "doing illegal things" and did not feel he "could tell the police everything and talk to them openly and

not suffer the consequences from it." It was not until McLoren talked to Sorkin after his initial interview with Detective Tauson that McLoren "felt ready to tell the truth about [his] involvement with marijuana, the extent of [his] dealing in marijuana, the extent of [his] use of marijuana to the authorities." Also, McLoren testified that it was not until Sorkin told him that he would not "be able to get these guys until [he told] the whole truth" that McLoren was, "for the first time," ready to be honest with law enforcement. The first person McLoren talked to from law enforcement was Deputy District Attorney Semow.

Following the two-month trial, the jury found petitioners guilty of first degree felony murder, with the special circumstances that the murder was committed during the course of a burglary and an attempted robbery. Petitioners were also convicted of first degree burglary and first degree attempted robbery. In addition, petitioner Jason Holland was convicted of assault with a deadly weapon. Petitioner Jason Holland was sentenced to life in state prison without the possibility of parole plus eight years, both petitioners Hein and Miliotti were sentenced to life in state prison without the possibility of parole plus four years, and petitioner Micah Holland was sentenced to twenty-nine years to life in state prison.

B. Direct Appeal Proceedings

The California Court of Appeal affirmed the convictions of petitioners Jason Holland, Micah Holland, and Hein. As to petitioner Miliotti only, the court found insufficient evidence to support the special circumstance findings and struck those findings. Also, based on the holding in *People v. Dillon*, 34 Cal. 3d 441, 194 Cal. Rptr. 390 (1983), the

court found petitioner Miliotti's murder conviction violated California's constitutional proscription against cruel or unusual punishment and modified the judgment by reducing petitioner Miliotti's murder conviction from first degree to second degree murder, resulting in a new sentence of nineteen years to life. The California Supreme Court denied the petitions for review. This Court denied petitioner Hein's petition for writ of certiorari on October 1, 2001.

C. State Habeas Corpus Proceedings

Each petitioner filed a petition for writ of habeas corpus in the California Supreme Court, raising claims that included the one involved in the current petition, that the prosecution violated their due process right to a fair trial by knowingly presenting false testimony from McLoren that he could be prosecuted for selling marijuana (i.e., that there was no immunity agreement) and that he was testifying against petitioners primarily for altruistic reasons. In support of this claim, petitioners relied on *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972). On May 24, 2004, the California Supreme Court summarily denied the petitions on the merits. *See Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011).

D. Federal Habeas Corpus Proceedings

Each petitioner then filed a petition for writ of habeas corpus in the United States District Court raising several grounds for relief, including the false evidence claim. The court found that although there was false evidence presented that the prosecution knew or should have known about, the evidence was not material in that there was no reasonable

likelihood that it could have affected the jury's verdict. (Pet. App. at 74a-86a.) The court additionally rejected the remainder of petitioners' claims.

E. Federal Appellate Proceedings

The district court granted a certificate of appealability, and petitioners appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the judgment in a published opinion. In doing so, the court rejected petitioners' false evidence claim, finding that "although a few of McLoren's statements at trial were incomplete, the critical point of McLoren's testimony, to wit, that he could still be prosecuted for marijuana possession or sale, was true." Analyzing each of McLoren's statements, the court decided that "his testimony, viewed in its entirety, conveyed to the jury an accurate picture of his legal situation . . . . Similarly, *Napue* imposed no duty on [Deputy District Attorney] Latin to clarify McLoren's answers to open-ended questions about his willingness to be a witness or to specifically question him about the July 10 letter." The Ninth Circuit concluded that "[i]t was therefore not objectively unreasonable for the California Supreme Court to deny petitioners' state habeas petitions." (Pet. App. 18a-27a.) On July 16, 2010, the Ninth Circuit denied petitioners' petition for rehearing and rehearing en banc.

REASONS FOR DENYING THE PETITION

I. CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION DOES NOT FAIRLY PRESENT AN IMPORTANT QUESTION

Certiorari is not appropriate in this case because the Ninth Circuit's unanimous opinion simply

involves a fact-specific and correct application of law, despite petitioners' attempt to demonstrate a conflict with other circuit courts and this Court on the question of whether misleading evidence can ever amount to false evidence. Although the Ninth Circuit's opinion does not expressly decide the issue, it appears to assume that "misleading" evidence can constitute "false" evidence, and then rejects the claim under these particular circumstances. Indeed, in a later decision, the Ninth Circuit noted but declined to decide the issue of whether false evidence encompasses misleading evidence. Further, the allegedly conflicting cases from other circuits appear to be mostly, if not wholly, factually reconcilable. Finally, even if petitioner's claim could otherwise prevail on the merits, it would fail in this case under 28 U.S.C. § 2254(d) because there was no clearly established Supreme Court law that the knowing presentation of false evidence violates due process.

A. The Ninth Circuit's Decision Implicitly Assumes that False Evidence Under *Napue* Can Include "Misleading" Evidence

The petition for writ of certiorari is premised on an assertion that the Ninth Circuit in this case determined that there can be no constitutional violation from the prosecution's failure to correct "misleading" evidence because this is not "false" evidence. According to petitioners, the Ninth Circuit's determination is contrary to this Court's authority and strengthens a conflict in the circuit courts on this question. But the Ninth Circuit never explicitly reached this issue in its opinion. The Ninth Circuit's opinion, rather, appears to assume that misleading evidence can constitute a *Napue* violation,

and to show why the evidence at issue was not misleading.

Near the beginning of the Ninth Circuit's analysis on this issue, it notes that petitioners were claiming that the prosecutor's questioning "was misleading and could be characterized as presenting false evidence." (Pet. App. 19a.) Nowhere in the Ninth Circuit's subsequent discussion does it reject the notion that the presentation of evidence intended to mislead can ever be found "false." Rather, the court's denial of petitioners' false evidence claim is based on its conclusion that as to each piece of evidence, the prosecutor did not deceive the jury or knowingly lead the jury to any misimpression by failing to correct the evidence. In this regard, the Ninth Circuit found that McLoren's "testimony, viewed in its entirety, conveyed to the jury an accurate picture of his legal situation . . . ." (Pet. App. 19a.) The Ninth Circuit explained why each of McLoren's testimonial statements comported with the truth under their "more plausible interpretation . . . ." (Pet. App. 27a.) And, as to the prosecutor's conduct, the Ninth Circuit found that there was no "deliberate" decision not "to expand upon McLoren's answers," especially considering that the prosecutor had "reason to believe that the [immunity] letter was in the hands of the defense . . . ." Under these circumstances, the Ninth Circuit's decision evinces a conclusion that the prosecution did not present or fail to correct misleading evidence in this case. Because the Ninth Circuit's denial of relief was consistent with a ruling that misleading evidence can constitute a *Napue* violation, the question presented is not outcome-determinative.

B. If a Circuit Split Is Developing Over Whether Misleading Evidence Should Constitute False Evidence Under *Napue*, the Ninth Circuit Has Not Chosen a Side

After the Ninth Circuit issued its opinion in this case, it addressed a *Napue* issue in another published case, *Towery v. Schriro*, No. 08-99022, ___ F.3d ___ 2010 WL 5157357, *6 (9th Cir. Sep. 22, 2010), *as amended*, Dec. 21, 2010. In *Towery*, the Ninth Circuit declined to determine whether the evidence at issue "was sufficiently misleading to satisfy the first *Napue* prong," whether the evidence was false, because the petitioner failed to satisfy the second prong, that the prosecution knowingly allowed false evidence. *Id.* The Ninth Circuit, however, did suggest a difference of opinion in the circuit courts on the question:

> There is some support for Towery's view that accurate testimony could be delivered in a sufficiently misleading context to make the evidence false for *Napue* purposes. *Compare United States v. Vozzella*, 124 F.3d 389, 390 (2d Cir. 1997) (recognizing that *Napue* applied to "the use of evidence that was in part false and otherwise so misleading as to amount to falsity"), and *United States v. Barham*, 595 F.2d 231, 240-41 (5th Cir. 1979) (holding evidence was false when witnesses testified they had not been offered leniency by "any of the attorneys" or "anybody in the Northern District of Alabama," but had in fact received promises from other authorities), *with Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000) (noting that "in order to establish a claim of prosecutorial misconduct or denial of due process, . . . the defendant must show that the statement in

> question was 'indisputably false,' rather than merely misleading." (quoting *United States v. Lochmondy*, 890 F.2d 817, 823 (6th Cir. 1989))).

Towery, 2010 WL 5157357, at *6.

Towery post-dated the opinion in this case by five months, and the Ninth Circuit was presumably aware of its own law when it determined that the issue was unsettled. Because the Ninth Circuit has not taken a position on whether misleading but accurate evidence can violate *Napue*, it would be inappropriate to grant certiorari in this case.

C. The Alleged Circuit Conflict Over Whether "Misleading" Evidence Is "False" Evidence Under *Napue* Is Shallow at Best, Illusory at Worst

Petitioner attempts to pit the circuits against each other on this issue, but it cannot be confidently shown that the courts would necessarily reach different results on the same facts. As indicated, the Ninth Circuit recently declined to resolve the issue of whether evidence needs to be "inaccurate" or only "misleading" to be considered "false" under *Napue*. Yet the case law suggests that the Ninth Circuit would expressly find misleading statements to fall within the purview of *Napue* were it to reach the question on direct review. *See United States v. Ramirez*, 608 F.2d 1261, 1266 n.9 (9th Cir. 1979) ("The prosecutor has a duty to apprise the court when he or she knows the witness is giving misleading testimony" even if the testimony is "perhaps literally true".) (*citing United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974)).

As to the cases from the other circuits that petitioner cites as requiring inaccuracy for falsity—

the Sixth, Eighth, and Eleventh Circuits—all (save perhaps one case) involve situations where the evidence apparently was *not* misleading, so the articulation of the legal standard made no practical difference. *See Hammond v. Hall*, 586 F.3d 1289, 1306-07 (11th Cir. 2009) (noting that the petitioner was alleging a *Giglio* violation from "misleading testimony," allowing that *Giglio* can involve "misleading testimony," but rejecting the *Giglio* and nondisclosure-of-evidence claims upon finding that the witness was not lying, that her testimony was "literally accurate," and that the relevant impeachment information came out at trial); *Smith v. Secretary, Dept. of Corrections*, 572 F.3d 1327, 1334-35 (11th Cir. 2009) (no *Giglio* error from the prosecutor's argument against the defense claim that two other men colluded together because they did not know each other where it was undisputed that the two men had "met in jail after the murder and had never spoken before that time"); *Pederson v. Fabian*, 491 F.3d 816, 828 (8th Cir. 2007) (no *Napue* error due to the "reasonable interpretation of the witness's statement that is entirely consistent with his earlier statements"); *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000) (no error upon finding that the witness was clearly referring to criminal charges, not to future parole revocation hearings, when he testified that he had no charges pending); *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989) (where the defense was provided impeachment material, the witness's "mere inconsistencies in testimony" did not show falsity); *but see Akrawi v. Booker*, 572 F.3d 252 (6th Cir. 2009) (finding the witness's testimony "technically accurate" but "misleading" but finding no reversible error because the "factual discrepancies" were "of relatively minor significance").

Moreover, as petitioner acknowledges, the Sixth, Eighth, and Eleventh Circuits in other cases have conceived misleading evidence to be false evidence. *United States v. Rivera Pedin*, 861 F.2d 1522, 1530 n.14 (11th Cir. 1988); *United States v. McClintic*, 570 F.2d 685, 692 (8th Cir. 1978); *Armour v. Salisbury*, 492 F.2d 1032, 1037 (6th Cir. 1974). These circuits have never acknowledged let alone resolved any intracircuit conflict on this issue. Any such disagreement would properly be addressed by these circuits on rehearing en banc, not by this Court on certiorari.

By the same token, of the seven circuits that petitioner characterizes as being in the camp of considering misleading evidence to be false evidence, only three (the First, Fourth, and Fifth) have found the falsity element satisfied solely on the basis of accurate but misleading evidence. *United States v. Bynum*, 567 F.2d 1167, 1169-70 (1st Cir. 1978) (finding evidence false because an accurate inference from the testimony "would probably be lost on a jury"); *Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977) ("we will not tolerate prosecutorial participation in technically correct, yet seriously misleading testimony which serves to conceal the existence of a deal with material witnesses"); *Dupart v. United States*, 541 F.2d 1148, 1149-50 (5th Cir. 1976) ("such a formalistic exchange of testimony, even though technically not perjurious, would surely be highly misleading to the jury"); *Boone v. Paderick*, 541 F.2d 447, 450 (4th Cir. 1976) (finding evidence false because "the prosecutor made statements which were clearly intended to give the impression that Hargrove knew nothing about possible lenient treatment"). Significantly, none of the *Napue/Giglio* cases from these circuits cited by petitioners arose in the setting of a federal habeas case like this one

where clearly established Supreme Court law is required for relief. *See* 28 U.S.C. § 2254(d). Also, these were factual settings where the evidence was intentionally and highly misleading, not merely subject to possible misinterpretation.

The other four circuits (the Second, Third, Seventh, and D.C.) have found evidence false only in scenarios where all or some of the evidence was inaccurate, or else have found the evidence not to be false in scenarios where there was no indication that the evidence was misleading. *United States v. Stadtmauer*, 620 F.3d 238, 268-69 (3d Cir. 2010) (no finding of falsity where there was no evidence that the witness's testimony was false "other than the inconsistencies between the FBI agent's notes and Zecher's recollection of his statements"); *Drake v. Portuondo*, 553 F.3d 230, 241-42 (2d Cir. 2009) (finding error in "main" part because of the witness's testimony that he had "learned about the facts of the case the night before his testimony" when in fact he had "learned the relevant facts two weeks prior to the trial"); *United States v. Morris*, 498 F.3d 634, 638-40 (7th Cir. 2007) (finding falsity because the prosecutor represented to the jury that the witness's plea agreement to ten years in prison was mandatory and could not be reduced when in fact the government could, and did, "move for a reduction below the statutory minimum"); *United States v. Iverson*, 637 F.2d 799, 802-03 (D.C. Cir. 1981) (finding error because of the witness's testimony that she had already been sentenced when in fact she had not); *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974) (finding error because "the witness' answer, although made in good faith, is untrue"); *Jenkins v. Artuz*, 294 F.3d 284, 287-89, 293 (2d Cir. 2002) (finding error in part because of the witness's testimony denying that he had made a deal with the

prosecution when in fact there had been an agreement); *United States v. Vozzella*, 124 F.3d 389, 392-93 (2d Cir. 1997) (finding error in part because the Government offered "two names of 'borrowers' in the Pietrosanti records [that] were fictitious"). The relatively small number of cases that this legal issue has arguably affected suggests that there is no important, "entrenched" split that needs to be resolved by this Court.

D. Since There Was No Clearly Established Supreme Court Law That False Evidence, Under *Napue*, Included Truthful But Misleading Evidence, the Ninth Circuit's Decision Should Not Be Disturbed

Under 28 U.S.C. § 2254(d), a federal court can only grant habeas relief based on an application of clearly established law from this Court. This law "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Where there are no such holdings from this Court, "it cannot be said that the state court 'unreasonably appli[ed] clearly established Federal law,' § 2254(d)." *Carey v. Musladin*, 549 U.S. 70, 76 (2006); *accord Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009) ("this Court has held on numerous occasions that it is not '"an unreasonable application of clearly established Federal law"' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court"); *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (denying relief under 28 U.S.C. § 2254(d) because "[n]o decision of this Court . . . squarely addresses the issue in this case").

In the context of resolving false evidence claims, this Court has never held that the prosecution's constitutional obligations entail not only correcting false evidence, but also any evidence tending to mislead. The cases have instead involved situations where the evidence deemed false involved an actual untruth. *See Giglio*, 405 U.S. at 150-55 (where there was an agreement that the witness would not be prosecuted, the witness's testimony that he received no promises that he would not be indicted was false); *Napue*, 360 U.S. at 271 (where the prosecutor had promised to recommend a reduction in the witness's sentence, the witness's testimony that the prosecutor did not so promise was false); *Miller v. Pate*, 386 U.S. 1, 7 (1967) (where the prosecutor knew that the defendant's underwear was stained with paint, the witness's testimony that it was stained with blood was false); *Alcorta v. Texas*, 355 U.S. 28, 30-31 (1957) (where the witness had been the victim's "lover and paramour, and had had sexual intercourse with her on many occasions," the witness's testimony "that his relationship with petitioner's wife had been only 'that of a friend and neighbor,[']and that he had had no 'dates,' nor other relations with her" was false).

In arguing that this Court has already held that the prosecution's use of evidence that "creates a materially misleading impression of the facts" violates due process, petitioners cite two false evidence cases (*Alcorta* and *Giglio*) and one nondisclosure-of-evidence case (*United States v. Bagley*, 473 U.S. 667 (1985)). (Pet. at 16-20.) None of these cases, however, held that a prosecutor's failure to correct evidence that creates a materially misleading impression of the facts violates due process.

As just parenthetically described, the witnesses in *Alcorta* and *Giglio* lied, and did not merely mislead. Yet, petitioner argues that in *Alcorta*, "the Court cited no evidence" supporting that the witness and victim had been on "dates" and simply concluded that the "testimony, *taken as a whole*, gave the jury the *false impression* . . . of casual friendship." (Pet. at 17 (*citing Alcorta* at 31 (emphasis in petition)).) On the contrary, the Court cited the witness's testimony that "his relationship with petitioner's wife had been only that of a friend and neighbor, and that he had had no dates, nor other relations with her," despite the admitted fact that he "had been her lover and paramour, and had had sexual intercourse with her on many occasions . . . ." Moreover, there was no reason for the Court to more precisely explore the witness's testimony because he "issued a sworn statement in which he declared that he had given false testimony at the trial." *Alcorta* at 30.

As to *Giglio*, the prosecutor himself argued to the jury that the witness "received no promises that he would not be indicted," and a prosecutor in the same office later filed an affidavit that "[i]t was agreed that if [the witness] would testify before the Grand Jury as a witness for the Government, . . . he would not be . . . indicted." *Giglio*, 405 U.S. at 152-53 & n.2. Despite this literal contradiction, petitioner attempts to construe conceivably truthful readings of the witness's false statements in question based on the limited information provided in the opinion, but it was undisputed that the statements were false. Likely, the falsity issue was relatively undeveloped because the issue concerned in *Giglio* was whether one prosecutor's knowledge of falsity must be imputed to another prosecutor from the same office.

Nor does *United States v. Bagley*, 473 U.S. 667, constitute clearly established Supreme Court law that false evidence can merely be that which gives a misleading impression. (See Pet. at 19-20.) First, *Bagley* was a case that involved the failure to disclose evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and was not a case about the prosecution's failure to correct false evidence. And although the two doctrines are related, they are distinct. Whereas *Napue* requires "upon the prosecution a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath, . . . criminal defendants are entitled to much more than protection against perjury" under *Brady*. *California v. Trombetta*, 467 U.S. 479, 485 (1984). The *Brady* disclosure requirement goes beyond preventing perjury but includes all "exculpatory evidence". *Id.* It was in that context that the opinion found that the "respondent's discovery motion misleadingly induced defense counsel . . . ." *Bagley*, 473 U.S. at 683. Just as importantly, the portion of the *Bagley* opinion (Part III) discussing how opposing counsel was misled by the nondisclosure was from a two-justice plurality, not a majority, and for this reason as well does not constitute clearly established Supreme Court law.

Whether misleading evidence is false evidence "is an open question in [this Court's] jurisprudence"; there is no clearly established Supreme Court law on the issue. *Musladin*, 549 U.S. at 76. Given this Court's emphasis in the "false evidence" line of cases on preventing untrue or perjured testimony, as distinguished from its emphasis in the suppression of evidence line of cases of ensuring the disclosure of all evidence favorable to the accused, it was objectively reasonable to view this Court's precedent as not

necessarily extending the prosecutor's nonadversarial obligations to the correction of all potentially misleading evidence. Language in some circuit cases that accurate or truthful statements do not constitute false evidence under *Napue* is not contradicted by any holding of this Court. Under these circumstances, there is no serious issue about the correct result under 28 U.S.C. § 2254(d).

II. CERTIORARI SHOULD BE DENIED BECAUSE THE CALIFORNIA SUPREME COURT REASONABLY REJECTED PETITIONERS' *NAPUE* CLAIM

As the federal district court and the Ninth Circuit concluded, petitioners are not entitled to relief because the California Supreme Court's rejection of their false evidence claim was not contrary to or an unreasonable application of clearly established Supreme Court law. Specifically, it would be reasonable for the state court to find that the evidence was not false and, moreover, that it was not material.

When a state court adjudicates a claim on the merits, federal habeas corpus relief on that claim is barred unless the state-court adjudication was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Price v. Vincent*, 538 U.S. 634, 638-39 (2003). This is a "'highly deferential standard for evaluating state-court rulings,' . . . which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)

(per curiam) (*quoting Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

A state court decision is "contrary to" federal law if it either "applies a rule that contradicts the governing law" as set forth in Supreme Court opinions, or reaches a different decision from a Supreme Court opinion when confronted with materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. at 405-06. A state court makes an "unreasonable application" of federal law if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at 413. Federal habeas corpus relief is not available simply because a federal court independently concludes "that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. at 411.

Here, petitioners' claims asserting *Napue* violations were presented for the first time in habeas corpus petitions filed in the California Supreme Court. The California Supreme Court denied relief on these claims without comment or citation of authority. These summary denials constituted rejections on the merits. *Harrington v. Richter*, 131 S. Ct. at 784-85. Under this circumstance, petitioners' burden "still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* at 784.

A. The Ninth Circuit Correctly Concluded That the State Court Could Reasonably Determine That There Was No False Evidence

This Court has made clear that the "deliberate deception of a court and jurors by the presentation of known and false evidence is incompatible with the rudimentary demands of justice." *Giglio*, 405 U.S. at 153. It is well-settled that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). The prohibition against the use of false testimony applies even when the testimony in question was relevant only to the witness's credibility. *Napue*, 360 U.S. at 269.

Petitioners allege four instances at trial relating to the immunity letter that allegedly "left the jury with the false impression that McLoren was risking prosecution for his marijuana dealing by testifying." (Pet. at 20-25.) The Ninth Circuit correctly ruled, however, that it was objectively reasonable to find otherwise.

First, petitioners complain that the prosecution allowed false testimony in that "McLoren claimed that his lawyer had not provided him with 'any assurances' regarding whether he would be prosecuted for his marijuana dealing." (Pet. at 20-21.) But, as the Ninth Circuit found, there was nothing false about McLoren's statement for two reasons. First of all, McLoren's testimony regarding his concerns about being prosecuted described McLoren's state of mind *before* the immunity agreement; the line of questioning at trial pertained

to the period of McLoren's initial questioning by detectives on May 26, 1995, before the July 10 letter. Second, McLoren was only granted "use immunity" under the agreement, such that "'nothing he tells [Semow] or the investigating officers about marijuana will be used in any way against him.'" Nothing in this agreement prohibited McLoren from being prosecuted. (Pet. App. 20a-22a.) Because the immunity given McLoren did not require him to testify at trial, let alone to give favorable testimony to the prosecution, his testimony was not false or misleading.

Moreover, the state court could reasonably conclude that even if McLoren lied, there was no evidence that the prosecutors knew the statement was false. The prosecutors would not have been privy to the conversation between McLoren and his attorney, nor could they have discovered the truth or falsity of this testimony, assuming they had that duty, because of the attorney-client privilege.

Second, petitioners argue that McLoren lied or gave misleading testimony when he "answered a series of questions about his motivation for testifying and repeatedly offered altruistic explanations (e.g., to honor his dead friend or because his 'grandma' told him to do it), never acknowledged receiving immunity, and asserted that it was 'more important to get these guys than drugs.'" (Pet. at 21-22.) The Ninth Circuit properly found, however, that "the more plausible interpretation" of "McLoren's statement that it was 'more important to get these guys than drugs'" was "that McLoren was stating that he was testifying at trial because the *prosecution* was concerned only about the murder and did not care about his relatively minor drug crimes. This interpretation comports with McLoren's testimony

that he was told that he was not a priority." (Pet. App. at 27a (emphasis in original).)

The Ninth Circuit also correctly found that McLoren's testimony about his motivations was not false because McLoren merely "listed alternative reasons for his willingness to be a witness, none of which are facially false. Therefore, even if McLoren's failure to mention that use immunity played a role in his decision is viewed with some skepticism, petitioners fail to demonstrate its falsity." (Pet. App. 25a.) And McLoren never testified that his desire to avenge his friend's death was his sole or primary reason for testifying. In fact, McLoren testified that his grandmother's advice did not cause him to tell the truth. (RT at 4085-86.) Accordingly, the best that petitioners could show was that there was an utter absence of evidence on the immunity letter.

Moreover, as the Ninth Circuit noted, there is no proof that McLoren actually knew of the immunity letter to McLoren's counsel, since McLoren never signed it. (Pet. App. at 25a-26a.) Because McLoren's state of mind (i.e., motivation) was the subject of the testimony, his actual knowledge of the letter would have to be shown, not simply the existence of the letter.

Third, petitioners term misleading McLoren's testimony that his grandmother told him "just to take the drug charge and just bust" petitioners because "testifying or cooperating with the authorities in this case could not have led to a drug charge." (Pet. App. 22-23.) But the Ninth Circuit correctly found that the state court reasonably rejected this "colorable claim" because, "if McLoren's grandmother offered the advice before July 10, 1995, McLoren could still have been risking criminal liability. But even assuming the statement was

made after July 10, McLoren's answer was still not false because, as noted earlier, his understanding as to the existence of the July 10 letter has not been established. Moreover, McLoren's statement did not foreclose or diminish the possibility that he was granted use immunity." (Pet. App. 26a-27a.) These reasons amply demonstrated the reasonableness of the state court's rejection of the claim.

Fourth and finally, petitioner asserts that the Ninth Circuit erred in considering solely as a prosecutorial misconduct claim, and in failing to consider as also contributing to a false evidence finding, that Deputy District Attorney Latin argued in rebuttal that, by testifying, McLoren "opened himself up to embarrassment, scorn, ridicule, contempt and *criminal liability*, but he did it because he understood that that is what it takes to tell the truth and be believed" (RT at 6219, emphasis added). (Pet. at 23-25.) The Ninth Circuit correctly found, however, that in the absence of any false evidence on the point, the prosecutor's comment alone could not form the basis of a *Napue* violation, which requires the presentation of false testimony or evidence. As the Ninth Circuit explained, "[a]rgument in summation is hardly equivalent to evidence in its impact on a jury" and it "did not present the same threat to the truth-seeking function of the trial process as false evidence would have. It is, thus, inappropriate to treat it as submission of false evidence." (Pet. App. 33a-34a n.12 (*citing Donnelly v. De Christoforo*, 416 U.S. 637, 646-47 (1974)); *see also* Pet. App. 35a (*citing Donnelly* at 647 ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.")).)

Although petitioners rely on *Giglio*, the Court there found additional error from the prosecutor's argument capitalizing on evidence that it had found was false. *See Giglio*, 405 U.S. at 150-55.

And, as the Ninth Circuit noted in finding no misconduct, the prosecutor's comment, while it conceivably could have incorrectly been construed as "that McLoren exposed himself to prosecution for marijuana dealing by testifying," could also have taken as "that McLoren's testimony exposed him to charges of perjury if he lied on the stand." Given that the trial court "had made a number of conscientious evidentiary rulings and timely admonitions throughout summation . . . [i]t is probable that the judge found the statement ambiguous as well." (Pet. App. 30a-31a.) Unlike the unambiguous and false prosecutorial statements in *Giglio*, the reasonable interpretation of the prosecutor's statement supported the determination that the prosecutor did not knowingly present false or misleading testimony.

The Ninth Circuit correctly found that the state courts could reasonably determine that no false evidence was introduced in this case. Petitioner's unmeritorious arguments that the Ninth Circuit misapplied this Court's precedent do not warrant certiorari review.

B. The District Court Correctly Concluded That the State Court Could Reasonably Determine That Any False Evidence Was Not Material

Because the Ninth Circuit correctly found that the state court could reasonably determine that there was no false evidence, it did not decide whether any false evidence was material. However, the district

court soundly rejected petitioners' claim on this basis upon finding that "the jury was already aware of the basic information which undermined McLoren's credibility" and that the evidence of the attempted robbery "was supported by substantial corroborating evidence." (Pet. App. 81a-86a.) As a result, this Court should deny the petition for writ of certiorari because even if it were to rule in petitioners' favor on the issue of the knowing presentation of false evidence, petitioners would still not be entitled to habeas relief.

As stated earlier, the test of materiality is whether there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. at 103. As set forth below, in light of the evidence and record as a whole, the California Supreme Court could reasonably determine that there was no reasonable likelihood that the alleged false testimony and argument could have affected the jury's verdict.

First, long before the immunity agreement, McLoren reported that petitioners attempted to rob him. As the district court correctly recognized, the challenged evidence focused solely on the motivating factors behind McLoren's testimony. However, both before and after the grant of immunity, McLoren consistently reported that petitioners came to the fort to rob him: when McLoren ran into the house after the stabbings, McLoren told his mother that petitioners had come to steal his "stuff" (RT at 4127); when Deputy Knox arrived at the scene, McLoren told him that petitioners had come to steal his electronic equipment (RT at 4655-56); when McLoren talked to Detectives Tauson and Neumann, he told them that petitioners had come to steal his electronic equipment and perhaps also some marijuana and

video games (ER at 171, 185); and when McLoren testified at trial, he testified that petitioners had come to steal marijuana (RT at 3582-84). The only variation was in the objective of the theft, changing from "stuff" to electronic equipment/video games to marijuana. While McLoren admitted only after the immunity letter that marijuana was the target of the theft, the key aspect of McLoren's testimony—that petitioners attempted to rob him—pre-dated the immunity agreement and remained unchanged, unaffected by the grant of immunity. And, as the Ninth Circuit noted in finding no cumulative prejudice from the alleged errors in the case, "the prosecution's 'criminal liability' statement was ambiguous and, in any event, occupied only a brief moment in summation at the end of a long trial and had little risk of rendering the entire trial unfair." (Pet. App. 39a.)

Second, McLoren's credibility was significantly impeached at trial. Although petitioners contend that McLoren's false testimony served to improperly enhance McLoren's credibility (Pet. at 26-28), as the district court aptly recognized: "[E]ven if petitioners had been able to confront McLoren with the immunity agreement, it is not reasonably likely that any cross-examination or additional argument on the subject would have added significantly to the defense, because the jury was already aware of the basic information which undermined McLoren's credibility. Indeed, most of the same ingredients for attacking McLoren's credibility had already been brought out." (*See* Pet. App. 82a.) Specifically, McLoren testified that Detectives Tauson and Neumann told him that they were interested in convicting petitioners for the murder and were not interested in prosecuting him for selling marijuana. (RT at 3648, 3709-10, 3749-50.) Although McLoren

said that he did not receive any assurances against prosecution, he admitted that he told Deputy District Attorney Semow about his dealings with marijuana only after he had retained a lawyer to protect him against prosecution and his lawyer instructed him to tell the whole truth. (RT at 3923, 4070-71, 4087-88.) This was emphasized by the defense in argument. (RT at 5986-87 (defense counsel argued: "'This is a victim that comes with his own attorney. This is a victim who cannot give a statement, who . . . must consult with an attorney. This is a victim who's fearful for his own legal liability for this situation.").) Thus, the jury was aware that McLoren was initially untruthful and changed his testimony only after retaining counsel to deal with the marijuana issue.

Third, as the district court also recognized (*see* Pet. App. 83a), McLoren's testimony that petitioners attempted to rob him—which was the key issue in the case—was supported by substantial, independent evidence. Initially, the manner in which petitioners entered McLoren's backyard was unusual and suspicious. McLoren testified that petitioners "hopped" over his fence and that "nobody does that." (RT at 3569.) Petitioners outnumbered McLoren and Farris two to one, increasing the intimidating nature of the entry into the backyard. Petitioner Micah Holland, who was the first to enter the backyard, had a "crazy expression on his face" and did not respond when McLoren greeted him. Instead, petitioner Micah Holland walked straight into the fort. (RT at 3574, 3578.) Petitioner Jason Holland confirmed McLoren's description of these events. (RT at 4887-89.)

Also, the fact that the fight broke out between petitioner Micah Holland and McLoren immediately after petitioners arrived at the fort, as confirmed by

the testimony of petitioner Jason Holland, was consistent with McLoren's testimony that he was attacked when he refused to give petitioner Micah Holland the keys to the drawer where he kept his marijuana. (RT at 4892-93.) Moreover, petitioners' claim that they intended to buy marijuana was undermined by the fact that Chris Velardo, who had been at the fort earlier that day, chose to wait in his truck while petitioners entered McLoren's property. (RT at 2194-98.) Further, petitioners' behavior, both before and after the stabbings, gives rise to an inference that petitioners intended to rob McLoren. About an hour before the stabbings, petitioners were together at Gates Park when petitioner Jason Holland stole Alyce Moulder's wallet. (RT at 2890-97.) Immediately after petitioner Jason Holland repeatedly stabbed McLoren and Farris, petitioners were observed walking towards Velardo's truck, talking among themselves with smiles on their faces. (RT at 4093-101.)

Based on the foregoing, the district court correctly ruled that the California Supreme Court could reasonably determine that there was no reasonable likelihood that any false testimony concerning the immunity agreement or McLoren's motivations for testifying could have affected the jury's judgment. Because a determination that the allegedly false evidence was not material was not contrary to, or an unreasonable application of, clearly established Supreme Court law, this Court's resolution of the question presented would not change the outcome in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted

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